



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2003

Ms. Jo-Christy Brown
Brown & Carls
106 East 6th Street, Suite 550
Austin, Texas 78701

OR2003-8171

Dear Ms. Brown:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190989.

The Georgetown Police Department (the "department"), which you represent, received a request for eight categories of information relating to two internal affairs investigations. You inform us that the department has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted. We also have considered the comments that we received from the requestor.¹

Section 552.103 of the Government Code, also known as the litigation exception, provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents that are sufficient to establish the applicability of this exception to the information at issue. To meet its burden under section 552.103, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to the pending or anticipated litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both aspects of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated is determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that the submitted information relates to two internal affairs investigations that involve two employees of the department. You state that one of these employees has retained the requestor as her attorney. You assert that the City of Georgetown has reason to believe that the employee has hired an attorney in anticipation of litigation against the city. We note, however, that the mere fact that an individual has hired an attorney does not establish that litigation is reasonably anticipated for purposes of section 552.103. *See* Open Records Decision No. 361 at 2 (1983) (fact that request for information was made by attorney on behalf of rejected applicant not sufficient to invoke litigation exception). You have provided no other evidence that litigation was reasonably anticipated on the date of the department's receipt of this request for information. Therefore, we find that you have not demonstrated that litigation was reasonably anticipated when the department received the request. *See* Gov't Code § 552.103(c). Consequently, the department may not withhold any of the submitted information under section 552.103 of the Government Code. *See also* Open Records Decision Nos. 518 at 5 (1989) (governmental body must furnish evidence that

litigation is realistically contemplated and more than mere conjecture), 452 at 4 (1986) (statutory predecessor to Gov't Code § 552.103 required concrete evidence showing that claim that litigation may ensue was more than mere conjecture), 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor), 328 at 2 (1982) (fact that litigation "may result" not sufficient to invoke statutory predecessor).

The department also seeks to withhold the submitted information under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Generally, section 552.108(a)(1) is applicable if it demonstrated that the release of the information at issue would interfere with a pending criminal investigation or prosecution. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 636 at 2 (1995).

The department also raises section 552.108(b)(1). An internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution may be withheld under section 552.108(b)(1) if it is demonstrated that "release of the internal record or notation would interfere with law enforcement or prosecution." See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) protects information which, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision No. 636 at 2-3 (1995). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. See, e.g., Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from Department of Public Safety would interfere with law enforcement because disclosure would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. See,

e.g., Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). A governmental body that relies on section 552.108(b)(1) must sufficiently explain how and why the release of the information at issue would interfere with law enforcement and crime prevention. See Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989); see also Open Records Decision Nos. 434 at 2 (1986) (circumstances of each case must be examined to determine whether release of particular information would interfere with law enforcement or crime prevention), 409 at 2 (1984) (whether disclosure of particular records will interfere with law enforcement or crime prevention must be decided on case-by-case basis).

You inform us that the submitted information relates to two internal affairs investigations conducted by the department. You also state that it appears that possible criminal charges may be applicable to some of the allegations that are the subject of these investigations. We note, however, that section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. See *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You do not inform us, and the submitted information does not otherwise indicate, that the internal affairs investigations to which the information at issue relates have resulted in any criminal investigations or charges. Moreover, the submitted investigative records reflect that the subjects of the investigations were notified that information provided to internal affairs investigators could not be used for the purposes of criminal proceedings. See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office”). We therefore conclude that the department has not demonstrated that any of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

We note, however, that the department must withhold small portions of the submitted information under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The common-law right to privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse

in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private). We have marked the portions of the submitted documents that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. The department also must withhold this same type of information wherever it is mentioned on the submitted audiotapes.²

The submitted information also contains the social security numbers of members of the public. One of these social security numbers also is mentioned on the audiotapes. These social security numbers are confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if they were obtained or are maintained by a governmental body under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted information are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in question were obtained or are maintained under such a law and are therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security numbers that we have marked, the department should establish that they were not obtained and are not maintained pursuant to any provision of law enacted on or after October 1, 1990.

The department also may be required to withhold a small portion of the submitted information under section 552.117 of the Government Code. The home address, home telephone number, social security number, and family member information of a peace officer must be withheld from the public under section 552.117(a)(2), regardless of whether the officer complies with section 552.024 or 552.1175. Section 552.117(a)(2) adopts the

²We note that the submitted documents contain other information that ordinarily would be protected from disclosure by common-law privacy under section 552.101. In this instance, however, the private information pertains to the requestor's client. The requestor has a special right of access to private information that relates to his client, and thus that information may not be withheld from the requestor on privacy grounds. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body for information concerning herself). Should the department receive another request for this information from a person who would not have a right of access to it, the department should resubmit this same information and request another decision.

definition of peace officer found at article 2.12 of the Government Code. If the information that we have marked under section 552.117 pertains to a peace officer, then the department must withhold that information under section 552.117(a)(2).³

If the marked information relates to a current or former civilian employee of the department, it may be excepted from public disclosure under section 552.117(a)(1). The home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body are excepted from disclosure under section 552.117(a)(1) if the information relates to a current or former employee who timely requests under section 552.024 that the information be kept confidential. Whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be determined when the governmental body receives the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the department may only withhold information under section 552.117(a)(1) on behalf of a current or former civilian employee who made a request for confidentiality under section 552.024 prior to the date of the department's receipt of this request for information. The department may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. Thus, the information that we have marked under section 552.117 must be withheld under section 552.117(a)(1) if the information relates to a current or former civilian employee who timely requested confidentiality for the information under section 552.024.

Lastly, we note that other portions of the submitted information are protected by copyright. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the department must withhold the submitted information that is protected from public disclosure by common-law privacy under section 552.101 of the Government Code; (2) the department may be required to withhold the social security numbers of members of the public under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (3) the department also may

³The submitted documents and audiotapes also contain information relating to a peace officer that the department would ordinarily be required to withhold under section 552.117(a)(2). However, the information in question relates to the requestor's client. The requestor also has a right of access to his client's section 552.117 information under section 552.023.

be required to withhold the information that we have marked under section 552.117. The department must release the rest of the submitted information, complying with copyright law in doing so.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

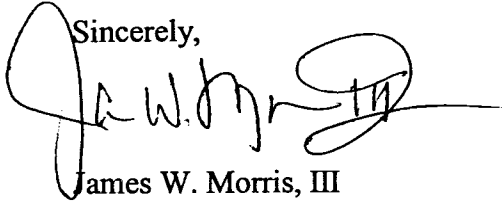
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 190989

Enc: Submitted documents

c: Mr. Tony Conners
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(w/o enclosures)